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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FEDERAL INSURANCE COMPANY & COMETALS, INC.,
Petitioner,

v.

THE UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF AMICUS CURIAE OF THE AMERICAN ASSOCIATION OF EXPORTERS & IMPORTERS IN SUPPORT OF PETITIONERS

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The American Association of Exporters and Importers ("AAEI"), with the written consent of all parties,[1] respectfully submits this brief amicus curiae in support of petitioners' petition for writ of certiorari to the United States Court of Appeals for the Federal

[1] The parties' consent letters have been filed with the Clerk of the Court.

Circuit (CAFC). The brief supports the position of the petitioners that the decision by the CAFC in holding that equitable estoppel is not available against the government in a case involving the collection of import duties is in conflict with expressions of this Court and other circuit courts of appeals and involves an important question of law which has not been settled by this Court.

INTEREST OF THE AMICUS CURIAE

The American Association of Exporters and Importers ("AAEI"), with a membership of over 1000 United States companies, was organized 66 years ago to promote fair and open world trade. It is the only national association representing the interests of U.S. importers and exporters before the Executive Branch, Congress, the U.S. Trade Representative, the U.S. Customs Service and other regulatory agencies.

Substantially all of AAEI's members utilize the services of licensed customs brokers to assist them in dealing with the U.S. Customs Service. The licensed customs broker clears the merchandise through Customs, prepares and submits the necessary documents, and pays the duties and fees on the importer's behalf. The monies for duties are most often the importer's. Sometimes, however, brokers will advance monies for the importer's account. AAEI members depend upon both the expertise and the integrity of brokers to facilitate the movement of their merchandise.

An importer is at risk when it advances money to a broker for duties. The broker's bankruptcy, or outright larceny, can separate an importer from the monies advanced while the underlying obligation to Customs remains unsatisfied, with the importer prin-

cipally liable. In such situations, an importer has little chance of recovering its funds. Importers have long recognized their exposure and accepted such risks.

However, it is unacceptable to the importing community when the government, having undertaken the regulation and oversight of customs brokers, does not discharge those undertakings adequately. Importers rely on the government's assessment of a broker's competency and solvency in entrusting their merchandise to them for entry and their money to them for the payment of duty. Such reliance should not be to the importer's detriment.

AAEI has a direct interest in the outcome of this litigation. It is keenly aware of the problem of misuse of clients' funds by licensed customs brokers. Broker fraud causes all importers, including AAEI members, to sustain financial losses. The existence of broker fraud debilitates a system, beneficial to both the government and importers, which can only continue to work effectively if the regulations governing customs brokers are enforced.

ARGUMENT

THE CAFC ERRED IN REFUSING TO GRANT EQUITABLE ESTOPPEL TO AN IMPORTER INJURED BY THE GOVERNMENT'S AFFIRMATIVE MISCONDUCT IN FAILING TO FULFILL ITS CONGRESSIONAL MANDATE TO PROTECT IMPORTERS.

Customs brokers occupy a unique position in the Customs Service system by acting as intermediaries. The brokers act as a quasi-agent of the government, empowered to receive import duties and pay them to the government. Without the customs brokerage system in place, it is virtually inconceivable that our

government would be able to perform its functions of duty collection, data gathering, and Customs clearance. Indeed, trade itself would be impaired, which is not just a matter of parochial interest, but of fundamental importance to society at large.

A customs broker is also the importers' agent, assisting them in the movement of their merchandise. Both the government and importers depend on the integrity of customs brokers when they perform these duties. This unusual position was formalized through the licensing and supervision of customs brokers by the government, beginning with the first customs brokers bill in 1910.

The enactment of the first bill to license brokers in 1910 was Congress' acknowledgment of the vital function of the customs broker. It was also a recognition that the presence of dishonest brokers posed a serious problem which, if permitted to go unchecked, would result in serious damage both to the revenue and to importers. Thus, the bill provided for strict regulation of brokers by the Customs Service.

The legislative history of the 1910 bill (P.L. 67-205, June 10, 1910) reveals that from its inception the statutory and regulatory scheme to license and supervise customs brokers was a recognition of the significant role played by the customs broker and of the necessity of protecting both the government and the importer in their relations with customs brokers.

> *This bill is in the interest of good administration at the customs ports of entry of the country.* It has the approval of the Secretary of the Treasury, the collector of Customs at New York, and is supported by the principal

> customhouse brokers. *These brokers conduct the business of the importers at the customhouse, and it is believed that this bill, if enacted into law, will drive out of business the dishonest and unscrupulous broker.*

67 Cong. Rec. 7497 (1910). [Emphasis added]

In the 1935 amendments to 19 U.S.C. §1641, Congress continued its efforts to combat broker fraud by giving:

> . . . to the Secretary of the Treasury the power to regulate the conduct of the business of customhouse broker in such manner that the opportunity for fraudulent practices will be reduced to an absolute minimum.

S. Rep. No. 1170, 74th Cong., 1st Sess. at 3 (1935).

The statute was amended to reflect more clearly Congress' desire to afford protection to importers as well as the revenue through the statutory and regulatory supervision of brokers.

In amending 19 U.S.C. § 1641, Congress also affirmed the elevated position of customs brokers as quasi-officers of the United States Treasury whose licenses signified official approval of their character and competence.

> Customhouse brokers *are quasi-officers of the Treasury and* . . . by licensing them the Treasury holds out to importers that they are capable and honest in the conduct of their Customs business . . .

S. Rep. No. 1170, 74th Cong., 1st Sess. at 3 (1935).

The government's responsibility is to refrain from engaging in activities which might violate 19 U.S.C. § 1641 and to execute affirmatively the expressed intention to protect importers underlying section 1641. In response to a suggestion made in 1977 that Customs deregulate the brokerage industry while continuing the licensing procedures for customs brokers, a Customs Service Headquarters Task Force on Customhouse Brokers surveyed all of Customs' chief officials in the field, the district directors and regional commissioners. The study found that:

> approximately 95 percent of those officials stated that licensing (and regulation) of customhouse brokers is beneficial both to the Customs Service and the importing public and that stronger regulation is needed.

Interim Task Force Report, Headquarters Task Force on Customhouse Brokers, at 2 (1977).

Included in the Trade and Tariff Act of 1984 were amendments to section 1641 which heightened Customs' scrutiny of customs brokers and its power to discipline them for breaches of their duties to both the government and the public.

In the instant case, regulations necessary for Customs to fulfill these obligations were in place, but the Customs Service failed to enforce them for three years against Loudon, a broker it knew to be insolvent. The Customs Service knew as early as 1977, when it conducted an audit, that Loudon was no longer qualified to conduct business as a customs broker. Customs ignored this warning and did nothing to avert the disaster that occurred. By failing to act as it was obligated to by both law and regulation, Customs

"represented to . . . importers that [Loudon] was capable and honest in the conduct of [its] Customs business." S. Rep. No. 1170, *supra*, at 3.

The Customs Service had an obligation pursuant to 19 U.S.C. §1641 and 19 C.F.R. §111.27 to continue to oversee the activities of Loudon after its 1977 audit and was mandated to intervene immediately if Loudon's situation was not remedied. The fact that the government chose to do nothing about safeguarding importers and the revenue constituted affirmative misconduct.

This Court has never held that equitable estoppel is not available against the government. Indeed, the oft-quoted statement in *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984) attests to the contrary. This Court stated that it was reluctant to hold that:

> . . . There are *no cases* in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor and reliability in their dealings with their Government. 467 U.S. at 60. [Emphasis in Original]

AAEI submits that once the CAFC left the finding of affirmative misconduct by the government undisturbed, it was obliged to grant the remedy of equitable estoppel to the injured importer and surety.

Further, we submit that permitting the decision of the CAFC to stand will have a disturbing effect and negative impact on AAEI members and the importing community nationwide. This community, by virtue of

the tasks performed by brokers, has maintained a certain order and continuity. This continuity has also greatly benefited the government by facilitating the collection of import duties.

The decision of the CAFC calls into question the trust that importers have placed in a brokerage system regulated and controlled by the government. Surely, importers would not have delegated to brokers the job of preparing documents and submitting import duties on their behalf without this statutory and regulatory system of supervision, which they had every right as citizens to believe was being strictly enforced.

It is therefore essential that this Court grant the petition in this case in order to correct the error of the CAFC in denying the remedy of equitable estoppel in a case where the government has committed affirmative misconduct by failing to obey the congressional mandate to protect importers.

Conclusion

For the foregoing reasons, the American Association of Exporters and Importers respectfully urges this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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